INDEX

528319—59——1

CITATIONS

Cases:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals of November 14, 1958 (R. 422–432)[2] is reported at 265 F. 2d 338. The court's order of March 24, 1959 (R. 532–533) is set out at the end of the opinion, 265 F. 2d at 344.

JURISDICTION

The order of the Court of Appeals, entered on November 14, 1958, remanded the case to the Federal

[1] This is a companion case to *Power Authority of the State of New York* v. *Tuscarora Indian Nation*, No. 66, this Term.

[2] The transcript of record consists of two volumes—one volume cited "R. ——", contains 534 pages of testimony, opinions and other proceedings; the second volume, cited "R. Ex. ——", contains 243 pages of exhibits.

Power Commission for further proceedings, retaining jurisdiction in the court below (R. 432–433). Upon the Commission's report, the court entered its judgment on March 24, 1959 (R. 532–533). The petition for a writ of certiorari, filed May 11, 1959, was granted on June 22, 1959 (R. 533). The jurisdiction of this Court rests upon Section 313(b) of the Federal Power Act and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In Public Law 85–159, approved August 21, 1957, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the contruction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," subject to seven specified conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act"; in the event of any conflict, the provisions of Public Law 85–159 were to govern. By order of January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for the Niagara Project, including a pump-storage reservoir of 60,000 acre-feet capacity. Approximately one-half of the pump-storage reservoir would be located on lands of the respondent Tuscarora Indian Nation.

The questions presented are:

1. Whether Congress, in specifically authorizing the Niagara Project in 1957, granted the Power Authority of the State of New York the right to take lands of the

Tuscarora Indians needed for this purpose, without regard to any otherwise applicable provisions of the Federal Power Act limiting the use of Indian lands.

2. Assuming that the general limitations of the Federal Power Act are applicable, whether the Tuscarora lands sought to be used for the pump-storage reservoir constitute a "reservation" within the meaning of Section 4(e) and Section 3(2) of the Federal Power Act, so that the Niagara Project license within such areas must be based upon a finding that it will not interfere or be inconsistent with the purpose of the reservation.

3. Whether the Court of Appeals has exceeded its power and usurped an administrative function by directing the Federal Power Commission to amend its licensing order so as to exclude Tuscarora lands, instead of remanding the case to the Commission for its consideration of any further steps required in the public interest in the light of the decision of the Court of Appeals.

STATUTES INVOLVED

The provisions of Public Law 85–159, 71 Stat. 401, approved August 21, 1957, and pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*, are set forth in the Appendix, *infra*, pp. 76–82.

STATEMENT

Respondent Tuscarora Indian Nation filed a petition in the court below to review the Federal Power Commission's order issuing a license to the Power Authority of the State of New York for the con-

struction and operation of a hydroelectric project on the Niagara River, including 1,383 acres of Tuscarora land. The Court of Appeals, after some intermediate proceedings, sustained the objections of the Tuscaroras. The pertinent facts and proceedings are as follows:

1. *The Licensed Project.* (*a*) Between Lake Erie and Lake Ontario, the 36-mile Niagara River drops 326 feet. About half of the drop occurs at Niagara Falls and an additional 140 feet in the rapids immediately above and below the Falls. The mean flow of the Niagara River is about 200,000 cubic feet per second and because of the immense storage capacity of the upper Great Lakes, whose surplus water the River carries seaward, its flow is remarkably steady. The "head" created by this concentration of falls and rapids in a relatively short distance, combined with the large and steady flow of the river and its proximity to markets, makes the Niagara site one of the world's largest and most economical for hydroelectric development. The water available has a potential of more than twice the power capacity of the St. Lawrence site recently developed downstream.

The licensed Project proposes to utilize 314 feet of head for the production of power at Lewiston, New York. It will be the largest hydroelectric facility in the United States, costing more than $700,000,000. Its installed capacity will be 2,190,000 kilowatts, of which 1,800,000 kilowatts will be firm power available 17 hours daily, with an annual production of 13,000,000,000 kilowatt hours. The Project consists primarily of (1)

an intake structure about three miles above the Falls near Connors Island, (2) a cut-and-cover conduit system which will carry water from the intake about 21,500 feet across the city and town of Niagara Falls to the generating facilities below the Falls in Lewiston, (3) the Lewiston generating plant, (4) the Tuscarora pumping-generating plant east of the Lewiston plant and connected with it by an open canal, (5) the Tuscarora pump-storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 3,000 acres including 1,383 acres of the Tuscarora Indian Reservation (R. 392, 401–402, 417–418.).

The pump-storage reservoir was planned to maintain the project's dependable capacity, in view of the fluctuations in demand and in available water. The peak demand for power occurs during the day on weekdays. There is an unused excess of flow at night (and on weekends) and the disparity is particularly acute during the tourist season when the permissible diversion of water (under the treaty with Canada described below) is much greater at night than during the day. The solution provided is that the water not needed for power at night and on weekends will be pumped up into the reservoir on the Niagara escarpment and stored for release at the peak day hours, when the pumps (operating in reverse) serve as generators. A 60,000 acre-feet reservoir has been found essential to attain a dependable capacity of 1,800,000 kilowatts. R. 3, 224–227, 230–231, 394, 487–488; R. Ex. 4, 5, 6. See pp. 33–36, 43, *infra*.

(*b*) The licensed development was made possible by a 1950 treaty with Canada. Under the prior 1909 Boundary Waters Treaty, diversions from the Niagara River were limited to 36,000 cubic feet per second by Canada and 20,000 cubic feet by the United States. Treaty Series 548, 36 Stat. 2448. The United States share of this treaty amount was utilized in the Schoellkopf plant of the Niagara Mohawk Power Corporation, with an installed capacity of 360,000 kilowatts, under license from the Federal Power Commission issued in 1921, to expire in 1971.[3]

The 1950 treaty with Canada recognized the area's need for low-cost power, and greatly enlarged the permissible diversions "to avoid a continuing waste of a great natural resource and to make it possible for the United States of America and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes * * *." The treaty provides for a flow of 100,000 cubic feet per second over Niagara Falls during specified daytime and early night hours of the tourist season (April 1 to October 31) for purposes of the scenic attraction, and a flow of 50,000

[3] Temporary additional diversions of 12,500 cubic feet per second were authorized for emergency purposes by agreements with Canada in 1941. Executive Agreement Series 209, 223, 55 Stat. 1276, 1380. The additional diversions were used by Niagara Mohawk in the above-mentioned Schoellkopf plant and in the Adams plant, an older facility with 80,000 kilowatt capacity. Abandonment of the obsolete Adams plant was contemplated in all the Niagara development plans.

cubic feet at other times. All excess water [4] is divided equally between the United States and Canada for power purposes. The Senate ratified the treaty with the reservation that no development on the United States side would be undertaken without specific authorization by Act of Congress. 1 U.S.T. 694.

(c) Not until August 21, 1957, did Congress specifically authorize the Niagara Project.[5] The seven-year delay was occasioned by prolonged controversy over public or private development, marketing preferences and other matters of power policy, carried on through eight sessions of committee hearings and more than 30 proposed bills in the 81st to the 85th Congresses.[6]

---

[4] The excess amount available for power is estimated to fluctuate between 44,000 to 210,000 cubic feet per second, depending on the river flow, the time of year, and the time of day. S. Rept. 539, 85th Cong., 1st sess., p. 4.

[5] Before Congress passed its specific authorization in Public Law 85–159, the Power Authority filed an application for a license under the Federal Power Act. The Commission dismissed this initial application because of the reservation in the 1950 Treaty. The order dismissing the application was reversed and remanded by the Court of Appeals for the District of Columbia Circuit, which held that the treaty reservation was ineffective to restrict the Commission's power to license the project under the Power Act. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A.D.C.). This Court vacated the judgment of the Court of Appeals as moot after enactment of Public Law 85–159. *American Public Power Assoc., et al.* v. *Power Authority of New York*, 355 U.S. 64.

[6] Hearings were held before the Senate Committee on Public Works, or a subcommittee, in the first sessions of the 85th Congress, 84th Congress, 83d Congress and 82d Congress; before the House Committee on Public Works in the first and second

However, as the Congressional reports reiterated, there was throughout "no controversy as to the most desirable engineering plan of development." S. Rept. 539, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 7; H. Rept. 2635, 84th Cong., 2d sess., pp. 11–12; S. Rept. 2501, 83d Cong., 2d sess., p. 6; H. Rept. 713, 83d Cong., 1st sess., p. 8; 102 Cong. Rec. 8074, 8080, 8238; 99 Cong. Rec. 8386; see S. Doc. 113, 84th Cong., 2d sess., p. 11. The detailed plans were first set forth in the 1949 report of the Commission's Bureau of Power, which served as the basis for the treaty negotiations and for initial congressional consideration.[7] As requested in a resolution adopted June 5, 1951, by the Senate Committee on Public Works, the U.S. Army Corps of Engineers made further studies "to determine the most feasible general

---

sessions of the 84th Congress, and in the first sessions of the 82d Congress and 81st Congress. Joint hearings were held by the House Committee and a subcommittee of the Senate Committee in the 83d Congress, 1st session. The committee reports on the bill which was enacted were S. Rept. 539, 85th Cong., 1st sess.; H. Rept. 862, 85th Cong., 1st sess. Prior reports on other bills were S. Rept. 1408, 84th Cong., 2d sess.; H. Rept. 2635, 84th Cong., 2d sess.; S. Rept. 2501, 83d Cong., 2d sess.; H. Rept. 713, 83d Cong., 1st sess.

[7] Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949). For the relation of this report to the 1950 treaty, see S. Exec. Rept. 11, 81st Cong., 2d sess., p. 6; Message from the President, Senate Exec. Doc. N, 81st Cong., 2d sess., pp. 2, 3. The early bills uniformly required development in substantial accordance with the Bureau of Power report. *E.g.*, H.R. 8343—81st Congress; S. 517, S. 1963, S. 2021, H.R. 1642, H.R. 3146, H.R. 5099—82d Congress; H.R. 2289—83d Congress, quoted in the hearings of those Congresses, fn. 6, *supra*.

plans"[8] for utilization of the diversions authorized by the 1950 treaty, and submitted its report, printed as S. Doc. 113, 84th Cong., 2d sess.[9] Other studies were made by the New York State Power Authority and the Niagara Mohawk Power Corporation.

(*d*) On June 7, 1956, a rock slide destroyed a large part of the Schoellkopf plant of the Niagara Mohawk Power Corporation, which had been using 23,000 cubic feet of water per second from the Niagara River (including the temporary diversions—p. 6, *supra*). The urgent need for power resulting from the Schoellkopf disaster led to speedy compromise on all the issues which had delayed legislation. S. Rept. 539, 85th Cong., 1st sess., pp. 1–3, 6–9; H. Rept. 862, 85th Cong., 1st sess., pp. 1–3, 7–9; H. Rept. 2635, 84th Cong., 2d sess., p. 8; 103 Cong. Rec. 13194–13197, 14447–14448. In addition, it became evident that, instead of rebuilding the Schoellkopf plant, the entire diversion permitted in the United States could and should be utilized by the project to be licensed at Lewiston. Accordingly, the Project plans—which had previously assumed that 20,000 cubic feet per second were reserved for the Schoellkopf plant—underwent their last major revision, at the hands of the New York Power Authority. The installed capacity was raised to 2,190,000, of which 1,800,000 was firm dependable power on a 17-hour daily basis. The pump-storage and pumping-generating facilities required were also modified—and the contemplated reservoir was

[8] The resolution is quoted at S. Doc. 113, 84th Cong., 2d sess., p. 2.

[9] See S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., p. 5.

enlarged to 60,000 acre-feet. S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., pp. 5–7; Exhibits 13, 191, 218, R. Ex. 4–6, 42–44, 132.

(*e*) By Public Law 85–159, approved August 21, 1957, 71 Stat. 401, pp. 76–79, *infra*, Congress directed the Federal Power Commission to issue a license to the New York State Power Authority "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement."

Public Law 85–159 also instructed the Commission to include seven specific "licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act." The prescribed conditions settled all the previously disputed points. Cooperatives and municipalities were given preference for 50 percent of the power production and 20 percent of this amount was to be available in neighboring states. Niagara Mohawk was assured 445,000 kilowatts for a designated period to supply the customers of its Schoellkopf plant in exchange for relinquishment of its license. The New York Authority was given power to construct independent transmission lines for reaching its preference customers and to control the resale rates of distributors purchasing from it. The project was to bear the United States share of the costs of remedial works in the river and (up to a designated maximum) the costs of a scenic drive and park. Finally, the Act stated that the license was to be granted in conformance with the Commission's

Rules of Practice and Procedure but that, in the event of conflict, the provisions of the Act were to control.

(*f*) Accordingly, on January 30, 1958, the Commission issued a license to the Power Authority for the Niagara Project (Project No. 2216), including the works and storage reservoir described, *supra*, pp. 4–5 (R. 391–410). Disposing of the only significant technical question, the Commission selected a cut-and-cover conduit system, instead of tunnels or open canal, to carry the water through the towns (R. 395–399, 401). As to the proposed location of the pump-storage reservoir, although the New York Power Authority had not been permitted to survey Indian lands, it was estimated at the time of the first hearing before the Commission on the application that the reservoir would cover 2,800 acres and would utilize approximately 1,000 acres of lands of the Tuscarora Indian Nation. The Tuscarora Indian Nation objected to the use of any of its lands for reservoir purposes and the Town of Lewiston objected to the use of about 720 acres which it had planned to develop (R. 394–395).

In the decision issuing the license, the Commission found that a reservoir of the proposed capacity (60,000 acre-feet) was required to utilize properly the water resources involved. The town's request was refused. The Commission did not initially pass upon the Tuscaroras' objections, since it assumed that additional lands in the area would be available for reservoir purposes in the event the New York Power Authority would be unable to acquire the Indian lands (R. 394–395). However, in its order of March 21, 1958, denying the application of the Tuscarora Indian

Nation for rehearing, the Commission specifically found that the best location of the reservoir would require approximately 1,000 acres of land owned by the Tuscarora Indian Nation. It overruled the Tuscaroras' objections, holding that the lands involved did not constitute a "reservation" within the meaning of Sections 3(2) and 4(e) of the Federal Power Act (R. 412–414). On May 5, 1958, the Commission approved the Power Authority's Exhibit J to the license, a map showing the location of the project works, including the reservoir situated in part upon the Tuscarora Indian Reservation (Exhibits J, 167, R. 415-418, R. Ex. 23).

2. *The Tuscarora Indian Reservation.* (*a*) The Tuscarora Reservation occupies 6,249 acres in the township of Lewiston, New York (R. 488; Exhibits 189, 231, R. Ex. 31, 157), with a population of 944 as of April 1957 (R. 176). There are, at present, about 566 enrolled members of the Tuscarora Nation, of whom 413 live on the reservation (R. 197–198). The hundreds of additional residents of the reservation consist of Indians of other tribes and non-Indians who lease homes or reside in trailer camps (R. 54–55, 160-162, 176–177, 183, 191–192, 198). Except for a community house-gymnasium, forest and swamp areas and one farm belonging to the Nation, the reservation is allocated to individual members who may sell or transfer to other members, or lease to non-members, and whose lands descend by intestacy or by will (R. 52–58, 195–196, 198–199, 204, 370–377; Exhibit 235, R. Ex. 207–208, 212–213).

On the land sought to be taken for the storage reservoir of the Niagara Project (1,383 acres, or about one-fifth the reservation), there are 37 dwellings occupied by about 125 persons, one substantial barn, four other barns, small sheds and greenhouses (R. 72, 73, 88–89, 159, 488). Chief Harry Patterson farms 630 acres and he and his son are the only full-time farmers in the reservoir area (R. 75–77, 80, 88). There are also five other farms and various home gardens in the 1,383 acres (R. 89–90). The land, homes, and other improvements in the area were appraised at $980,000 (R. 71–74).

(*b*) The 1,383 acres sought for the reservoir are part of a parcel of 4,329 acres which the Tuscaroras purchased in the first decade of the 19th century from the Holland Land Company, using the proceeds from sale of the tribe's former lands in North Carolina to enlarge their holdings in Western New York, to which they had moved.[10]

As contemporaneous documents establish, the Tuscaroras requested and obtained the assistance of Sec-

[10] The lands thus purchased are shown as parcel C on Exhibit 231, R. Ex. 157, R. 483. Parcels designated A and B, 640 acres and 1280 acres respectively, were acquired by the Tuscaroras in 1799 by cession from the Holland Land Company. In the Treaty of Big Tree in 1797, the Land Company (through Robert Morris) acquired a large tract in Western New York from the Senecas, excepting certain reservations (R. 311–315, 317–320). The Tuscaroras residing in the area were not mentioned, apparently by inadvertence, and the Land Company thereafter agreed to cede first one square mile, then an additional two square miles to the use of the Nation. These were parcels A and B. Exhibits 232 A–E, 235, R. Ex. 165–170, 209, 211; R. 319–324.

retary of War Dearborn and persons appointed by him in North Carolina and New York (Exhibits 232 F-P, 244-248, R. Ex. 171-187, 223-230; R. 297-303). Since the North Carolina proceeds were being paid in installments, the Secretary was asked to act as escrowee—he was to receive the funds, hold them in the Bank of the United States, and make payments to the Holland Land Company (Exhibits 232 K, Q, R. Ex. 178-180, 188; R. 300, 303-304), and to hold the New York lands in trust until the payments were concluded (Exhibits 232 M, N, O, Q, R. Ex. 182-186, 188; R. 301-304). In 1804, upon its receipt of the first payment, the Holland Land Company conveyed the parcel to the Secretary of War "in Trust for the Tuscarora Nation of Indians" for the sole purpose of conveying the land to such persons as the Nation shall direct and appoint (Exhibit 232 S, R. Ex. 190-195; R. 304-305). Thereafter, some installment payments were handled by the Secretary (Exhibit 232 R, R. Ex. 189) but others were made directly to the Land Company by the Secretary's agent in North Carolina (R. 310-311, 336). Upon completion of the payments, in 1809, the Secretary transferred the land in fee simple to the Tuscarora Nation, which continues to hold such title (Exhibits 232 T-U, 235, R. Ex. 196-200, 209, 211; R. 305-307). As testified, the Tuscarora reservation area was created by this purchase transaction and not by any treaty, Act of Con-

gress or Executive Order (R. 354; Exhibit 250, R. Ex. 234–238).[11]

(*c*) Early in 1957, a representative of the New York Power Authority contacted members of the Tuscarora Nation concerning the reservoir area. He engaged in conversations, mailed to them the Power Authority's 26th Annual Report containing the outlines of the revised plans for the enlarged Niagara Project (p. 9, *supra;* Exhibit 191, R. Ex. 41–44), and specifically communicated the fact that, according to engineering studies, "a portion of the Tuscarora Reservation falls within the projected limits of the Storage Reservoir" (Exhibits 192, 193, R. Ex. 45–46; R. 110–112).[12] At a general tribal council meeting in March 1957, the Power Authority official requested permission to survey lands within the reservation. The request was refused (Exhibits 186, 193, R. Ex. 27–28, 46; R. 112). Further negotiations ensued (R. 113–114). At a council meeting one year later, in

[11] The reference in Indian treaties of 1784, 1789 and 1794 to the Tuscaroras clearly did not involve parcels A, B, and C in Western New York but referred to other areas in the central and eastern portions of the State in which portions of the tribe were then residing (R. 342–351).

[12] Latham, the Power Authority's resident engineer, first contacted Clinton Rickard, on the advice of a former mayor of Niagara Falls that he was a responsible member of the tribe. Rickard was not, however, a member of the tribal chiefs council (R. 124–125). In February 1957, on Rickard's advice, Latham contacted Hamilton Mt. Pleasant, chairman of the tribes' general council, to arrange the council meeting (Ex. 186, R. Ex. 27; R. 112). The letter of confirmation to Mt. Pleasant contained the quoted statement concerning the reservoir's location (Exhibit 193, R. Ex. 46).

May 1958, the Power Authority offered the Tuscaroras for the reservoir area about $1,100 per acre, plus moving, replacing or payment for houses, construction of a new community center, sale of cheap power from the Niagara development and employment of Tuscaroras on the development. This offer amounted to a proposed expenditure of about $2,400,000, including $1,500,000 for the 1,383 acres needed. It was rejected by the Tuscaroras but has never been withdrawn (R. 115–117, 120–121, 124, 148, 152, 155).

3. *Proceedings for Review of the License.* (*a*) On May 16, 1958, the respondent Tuscarora Indian Nation filed a petition for review in the court below challenging the license for the Niagara Project insofar as it sought to authorize the taking of Tuscarora lands (R. 419–422).

The Court of Appeals entered its opinion and interim judgment on November 14, 1958 (R. 422–432). It held, first, that the Tuscarora lands were protected by the federal statutes restraining alienation of Indian lands, citing 25 U.S.C. 177, 233, and that, therefore, "the consent of the United States must be found in some manner" (R. 423–424). The court then ruled that Public Law 85–159 did not constitute Congressional consent or authorization for the taking of the Tuscarora Indian lands for the Niagara Project. The court stated that Congress was aware only of the general location of the project works, not of the need for Indian lands or even, indeed, of any provision for the storage of water, and the Act was limited to designation of the licensee, the scope of the license, and seven licensing conditions. Since Congress did not

specify the project works or other matters, the power of the licensee to take the Tuscarora lands was, in the court's opinion, to be governed by the terms of the Federal Power Act (R. 425–428).

Turning to the authority available under the Federal Power Act, the Court of Appeals held that these Indian lands constitute a "reservation" of the United States within the meaning of Section 4(e) of the Federal Power Act (App., *infra*, pp. 80–81), and that the first proviso of Section 4(e) requires a finding by the Commission that the license will not interfere or be inconsistent with the purposes for which the Tuscarora Indian Reservation was created or acquired, as a prerequisite to the validity of a license authorizing their condemnation. This was so notwithstanding that the Tuscaroras had acquired the lands by purchase in fee simple and that the only interest of the United States was in its guardianship over Indian lands (R. 428–431). Accordingly, the court remanded the case to the Commission to explore the possibility of making the finding required by Section 4(e), expressly retaining jurisdiction pending receipt of the Commission's report (R. 431–433).

(*b*) The Commission held extensive hearings pursuant to the remand, exploring not only the possibility of making the required finding but also the possibility of removing the pump-storage reservoir from Indian lands. On February 2, 1959, the Commission found that the license, insofar as it includes lands of the Tuscarora Indian Nation, will interfere and be inconsistent with the purpose for which the Tuscarora reservation was created or acquired; two Commis-

sioners dissented on this point (R. 486–494). But the Commission also found from the whole record that a pump-storage reservoir with usable storage capacity of 60,000 acre-feet is essential to the utilization of the United States share of the water resources, as required by Public Law 85–159. The Commission pointed out that severe community disruption, unreasonable expense, and substantial delay would be caused by the flooding of part of the Town of Lewiston and, absent any feasible alternative, declared that removal of the reservoir from Indian lands would reduce storage capacity to 30,000 acre-feet, and result in a loss of one-sixth the dependable kilowatt capacity of the project (R. 487–488).

(*c*) The Commission's findings of February 2, and its order of February 25, 1959, denying the application of the Power Authority for rehearing (R. 506–512), were transmitted to the Court of Appeals. Upon various motions of the parties, the court declined to reconsider its earlier opinion and entered its final order and judgment on March 24, 1959 (R. 531–533). It approved the license except in so far as it would authorize the condemnation of Tuscarora lands for reservoir purposes, and remanded the case to the Commission with instructions to amend the licensing order so as to exclude specifically any such condemnation power (R. 533).[13]

[13] Before the decision below, the Court of Appeals for the Second Circuit ruled upon some of the same issues in a suit by the Tuscarora Nation to enjoin the New York Power Authority from proceeding with condemnation of their lands. On July 24, 1958, the Second Circuit held, first, that the federal restraints upon alienation of Indian lands applied to the

SUMMARY OF ARGUMENT

I

In the Niagara Development Act of 1957 (Public Law 85–159), Congress prescribed "a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159, p. 76, *infra*. The judgment below—eliminating Tuscarora lands from the Project's pump-storage reservoir—would frustrate this statutory objective and would substantially reduce the output and scope of the Niagara Project. The Court of Appeals relied upon the proviso of Section 4(e) of the Federal Power Act governing the taking of "reservations" for licensed projects. We submit that any such application of the Power Act at Niagara was necessarily superseded by Congress in Public Law 85–159.

A. 1. In the first place, contrary to the belief of the Court of Appeals, Congress clearly comprehended the whole project works within its authorization (in

---

Tuscaroras; second, that the power of the United States to take Indian land by eminent domain was not affected; third, that in the Niagara Project Act Congress impliedly authorized the taking of the Tuscarora land, inferrable from the size of the project, the contemplated need for a storage reservoir, and the proximity of the lands. The Second Circuit therefore explicitly affirmed the Authority's right to exercise eminent domain. It also held that the Power Authority had to condemn through a federal or state court procedure, instead of a summary taking, and to that extent granted relief to the Tuscaroras. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, certiorari denied, 358 U.S. 841.

Public Law 85–159) of a power development utilizing "all" the waters available, and particularly contemplated the pump-storage reservoir and the extent of dependable capacity thwarted by the decision below. The project works had been agreed upon by all interested parties and were repeatedly described in the Congressional committees and on the floor of Congress during the seven years leading up to the 1957 Act. At all times, these plans included a pump-storage reservoir east of the main Lewiston plant, as an indispensable feature to maintain a high-load dependable capacity. Up to 1956, the project plans were based upon partial utilization of the treaty waters, the rest being reserved for the then existing Schoellkopf plant, and the proposals for the reservoir, located between Military Road and the Tuscarora Indian Reservation, varied from 22,000 to 41,000 acre-feet. The collapse of the Schoellkopf plant in June 1956 made "all of the United States share" available for the Niagara Project. In 1957, Congress passed Public Law 85–159 with knowledge that the Niagara Project's capacity was being increased to 2,190,000 kilowatts installed, of which 1,800,000 kilowatts would be dependable power on a 17-hour daily basis, and that this larger dependable capacity would require a larger reservoir—with 60,000 acre-feet storage. It is this larger reservoir which necessitates 1,383 acres of Tuscarora land.

2. Moreover, in Public Law 85–159, Congress clearly set aside any provision of the Federal Power Act which might restrict a development of this contemplated size. The 1957 Act represents a legislative

determination of the broadest possible scope. Congress selected a licensee, the New York Power Authority, and resolved all issues of power marketing policy and allocation of costs. It also foresaw all essential engineering elements required for full utilization of the available Niagara water.

The actual issuance of the license was left to the Federal Power Commission under the Federal Power Act. However, supersession *pro tanto* of the Power Act was plainly intended, and such supersession would automatically result from inconsistencies between the Power Act and various provisions in Public Law 85–159—of which Congress was aware. Indeed, Section 2 of Public Law 85–159 explicitly provided, with respect to the Power Act, that "in the event of any conflict, the provisions of this Act shall govern * * *."

B. The proceedings before the Federal Power Commission have shown that the proviso in Section 4(e) of the Power Act, relied upon below, is in unavoidable conflict with the Niagara Project authorized in Public Law 85–159. The Commission found, first, that the Power Act proviso, if applicable, would not permit the taking of the Tuscarora lands. The second critical fact is that a 60,000 acre-feet reservoir is indispensable to a project with 1,800,000 kilowatts dependable capacity. Third, exhaustive studies of all alternative locations established that 1,383 acres of Tuscarora lands are indispensable to a reservoir with storage capacity of 60,000 acre-feet. The record shows, and the Commission has concluded, that no real alternative exists to the project as licensed. Elimination of the Tuscarora lands would compel use of a smaller reservoir and

would cause a possible loss of 300,000 kilowatts of dependable capacity—or, if raising the dikes proves feasible, a loss of 150,000 kilowatts of dependable capacity.

Accordingly, since the Section 4(e) proviso (if applicable) would conflict with full utilization of the Niagara waters, it was superseded by Public Law 85–159. An alternative ground for sustaining the licensed Project was advanced by the Second Circuit, which ruled that Congress had impliedly sanctioned the use of Indian lands; the court drew this conclusion from the size of the Project, the need for a large reservoir, and the proximity of Indian lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 893–894, certiorari denied, 358 U.S. 841. The presumed Congressional knowledge of the Tuscarora location is also buttressed by published maps, and by references in the legislative history of the 1957 Act.

C. Finally, there is nothing in the law applicable generally to Indian lands which militates against this result. Even when treaty obligations are being overridden, this Court has found sufficient Congressional authorization for the condemnation of Indian lands (not expressly designated) from two factors amply demonstrable here—the necessity to use Indian lands for a project specifically authorized by Congress, or the presumption that Congress knew of Indian lands in the vicinity. *E.g., Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*, 160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118. The requirements here are

even less stringent since the Tuscarora reservation was created by the tribe's purchase of lands and is not protected by treaty. As long as the conditions of any applicable federal legislation are satisfied, there is full authority to take Tuscarora lands.

II

Even if the Federal Power Act is wholly applicable, we submit that the Tuscarora lands, fully owned in fee by the tribe, do not constitute a "reservation" within Section 4(e) of that Act and hence may be condemned like other nonfederal lands needed for the Niagara Project. The term "reservation" has a special meaning in the Federal Power Act, comprehending only lands owned in fee by the United States or in which the United States has a real property interest.

A. Section 4(e) of the Power Act authorizes the Federal Power Commission to license hydroelectric and other facilities "upon any part of the public lands and reservations of the United States", among other areas. This grant of power is followed by the proviso at issue, establishing conditions for licenses "within any reservation." Thus, Section 4(e) is limited by its own terms to "reservations *of the United States.*"

The requirement of a definite proprietary interest in the Government is necessarily established by the definition of "reservations" in Section 3(2) of the Power Act, as "national forests, tribal lands embraced within Indian reservations, military reserva-

tions and *other* lands and interests in lands *owned by the United States* * * *" [emphasis added]. "Tribal lands" are thus designated among other federal lands—all the other lands referred to in the definition of "reservation" are indisputably federally-owned lands—and are qualified by the express statement that they must be "owned by the United States." This the legislative history confirms. The Government's parental or guardianship relation to Indian lands is not a proprietary "interest in land", within this definition.

B. In Section 4(e)'s grant of licensing authority to the Federal Power Commission, "public lands and reservations" constitute an independent basis of federal jurisdiction, apart from the commerce power over navigable streams. This Court has already held that the licensing power on "reservations" is based upon the Property Clause of the Constitution; in other words, the term "reservation"—in the grant of power to license, as well as in the proviso limiting that grant—must be construed to mean lands which are "Property belonging to the United States" (Constitution, Article IV, Section 3). *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443. The legislative history of the licensing power supports this conclusion and refutes the belief of the court below that, by "reservations", Congress included Indian lands outside of federally owned property. In this part of the Power Act, Congress was exercising only its authority to control and dispose of *federal property*.

C. The same special meaning for "reservation" follows from the Power Act's plan of compensation for lands. Under Section 21, licensees may condemn lands and properties needed for licensed projects. However, this does not cover lands owned by the United States; instead, Section 10(e) prescribes payment to the Government of "reasonable annual charges * * * for recompensing it for the use, occupancy, and enjoyment of its lands or other property". A proviso of Section 10(e) provides that "tribal lands embraced within Indian reservations" are included within these *Government* lands for which an annual charge is paid *to the United States.* The appropriate method of acquiring other lands—private or non-federal lands, such as the Tuscarora lands in suit, or interests in them—is by a condemnation proceeding.

D. Respondent and the court below have erroneously asserted that no distinction is ever made between different types of Indian reservations. To the contrary, the term "reservations" has been used in various statutory contexts as referring to some, not all, Indian reservations. The Federal Power Act is such a statute, which distinguishes between Indian reservations in which the United States owns trust title (or other real property interest) and reservations in which the Government has no real property interest. As we have shown, that distinction is based upon the nature of the jurisdiction exercised by the Federal Power Act, *i.e.*, jurisdiction founded on the Federal Government's right to control its own property.

III

Even if the decision below with the respect to the Tuscarora lands was proper, the Court of Appeals erred when it entered a judgment which in effect compelled the implementation of a modified license, instead of remanding the case to the Commission for its further consideration. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21.

ARGUMENT

The importance of this case can be measured by the scope of the long-awaited Niagara Project. Harnessing the spectacular kinetic energies of the Niagara Falls and River will be the largest hydroelectric development in the country. And the remarkable fact is that, when the natural flow and drop are combined with the "very ingenious system" of a pump-storage reservoir,[14] more than four-fifths of the project's rated kilowatt capacity will be "dependable", *i.e.*, available under the worst foreseeable conditions, for at least 17 hours of each working day. Fully 1,800,000 kilowatts of capacity can be guaranteed to the power grid of a great industrial area.[15]

---

[14] So described on the floor of Congress by Senator Douglas in 1956, 102 Cong. Rec. 8156. See also fn. 17, *infra*, p. 31.

[15] "Installed capacity"—2,190,000 kilowatts for the Niagara Project—signifies the nameplate rating of the generators. "Dependable capacity" means the electrical capacity available under the worst possible conditions. It was calculated here by taking the lowest recorded flow for the Niagara River and the most stringent treaty limitations upon diversion.

Niagara is unique among hydroelectric developments in the United States, because it does not have the wide fluctuations in flow characteristic of other rivers. In some developments

The Court of Appeals directed the Federal Power Commission to eliminate use of lands of the Tuscarora Nation for the Project. But as the record shows, and as the Commission has concluded and hereby reaffirms, Indian lands are absolutely essential for the construction of a pump-storage reservoir with 60,000 acre-feet storage, which in turn is indispensable to the dependable production of 1,800,000 kilowatts. Thus, the judgment below, if unreversed, will undoubtedly compel a serious reduction in the anticipated output and value of the Project.

This conflict itself goes far to demonstrate that reversal is required. For any limitation of the Project's dependable capacity would frustrate Congress' express direction, in Public Law 85–159 (the Niagara Development Act of 1957), to utilize *all* the United States share of the Niagara River water acquired by

---

due to this fluctuation, "dependable" is far below "installed" capacity. In others, dependable is available only for short periods, as little as four hours a day, and if the facility were run for 17 hours a day, as at Niagara, it would produce less than ¼ the dependable power from the same quantity of water. Such facilities could not adequately serve the Niagara market which includes plants requiring continuous high-load supply (*e.g.*, electro-chemical, electro-metallurgical production). Niagara's volume and availability of flow, when regulated in the pump-storage reservoir, provide the type of capacity particularly needed. A pump-storage reservoir of the size contemplated is necessary to achieve this capacity.

The remarkable constancy of the Niagara River is shown by comparison with, *e.g.*, the Columbia River, the world's largest hydroelectric power producer. Maximum flow on the Columbia (at The Dalles) is more than 35 times the minimum, while on the Niagara, maximum is less than three times the minimum (considering the treaty limitations, the water available for power varies by a factor of less than 5—see fn. 4, *supra*).

treaty with Canada. *Supra*, pp. 6, 7, 10–11. In answer, the court below relied upon conditions governing the taking of a "reservation" in the Federal Power Act. But, as we shall show in Point I, any such application of the Power Act was superseded by Public Law 85–159. Furthermore, we submit (in Point II) that the Tuscarora lands are not part of a "reservation" within the special meaning of that term in the Power Act—even if it is applicable—and, hence, may be condemned like ordinary private lands.

I

IN PUBLIC LAW 85–159 (THE 1957 NIAGARA DEVELOPMENT ACT), CONGRESS NECESSARILY AUTHORIZED THE TAKING OF TUSCARORA LANDS NEEDED FOR FULL DEVELOPMENT OF THE NIAGARA PROJECT, WITHOUT REGARD TO LIMITATIONS IN THE FEDERAL POWER ACT WHICH WOULD OTHERWISE BE APPLICABLE

A. THE 1957 NIAGARA DEVELOPMENT ACT SUPERSEDED THE FEDERAL POWER ACT TO THE EXTENT REQUIRED FOR FULL UTILIZATION OF THE NIAGARA WATERS, WHICH CONGRESS CONTEMPLATED AS PRODUCTION OF 1,800,000 KILOWATTS OF DEPENDABLE CAPACITY WITH A 60,000 ACRE-FEET RESERVOIR

1. The keystone of the judgment below, directing the elimination of Tuscarora lands from the Niagara Project, was the assumption that, in authorizing the Project in 1957, Congress limited itself to a few aspects but did not prescribe the project works or even know of a storage reservoir, and that it left the essential decision-making to the Federal Power Commission subject to the regular terms of the Federal Power Act (R. 425–428). On this point, the decision below is in direct conflict with the views of the

Second Circuit, expressed in a suit dealing with condemnation of the Tuscarora lands. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U.S. 841. We submit that the terms and legislative history of the 1957 Act show that the court below has erroneously and restrictively read Public Law 85–159, and that Congress effectively superseded any limitations upon the Niagara Project arising from the Federal Power Act or other provisions of law which would reduce the size of the pump-storage reservoir.

In the first place, contrary to the opinion below, Congress was fully cognizant of the project works and kilowatt production entailed by the stated legislative objective—"a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159, p. 76, *infra*. Particularly with this type of legislation, the general terms must be read against the reports and the legislative background. Congress customarily deals with such projects by brief reference to a plan or its name or description.[16]

---

[16] Authorization of federal projects is ordinarily by reference to Corps of Engineers reports or plans. *E.g.*, River and Harbor Act of 1958, 72 Stat. 297–300; Flood Control Act of 1958, 72 Stat. 305–315; Rivers and Harbors Act of 1945, 59 Stat. 10, 12–23. Subsequent reference in appropriation acts is most often by popular name only. *E.g.*, Public Works Appropriation Act of 1960, 73 Stat. 491, 493, 495 ("Missouri River, Kansas City to Mouth," "Allegheny River Reservoir," "Alamogordo Dam (Carlsbad Project), New Mexico"); Public Works

The works eventually incorporated in the licensed Niagara development were repeatedly described to Congress during the seven years of hearings and discussion separating the 1950 treaty with Canada from the enactment of Public Law 85-159; and, as the reports reiterated, there was throughout "no controversy as to the most desirable engineering plan of development". S. Rept. 539, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 7; H. Rept. 2635, 84th Cong., 2d sess., pp. 11-12; S. Rept. 2501, 83d Cong., 2d sess., p. 6; H. Rept. 713, 83d Cong., 1st sess., p. 8; 102 Cong. Rec. 8074, 8080, 8238; 99 Cong. Rec. 8386; see S. Doc. 113, 84th Cong., 2d sess., p. 11. "The development plan will be the same whether the project is constructed by private enterprise, the Federal Government, or the Power Authority of the State of New York." 99 Cong. Rec. 8386.

The court below apparently believed that Congress did not anticipate use of a pump-storage reservoir (R. 426). This is a significant error. As the Second Circuit has pointed out, the 1957 committee reports described such a reservoir in their summaries of the project plans. *Tuscarora Nation of Indians* v. *Power Authority, supra,* 257 F. 2d at pp. 893-894. See S. Rept. 539, 85th Cong., 1st sess., p. 5; H. Rept. 862, 85th Cong., 1st sess., p. 6. Further, every presentation of the development plans to Congress during the previous years included the same reservoir system, in

---

Appropriation Act of 1957, 70 Stat. 474, 476, 480 ("Moorhead Dam and Reservoir, Montana," "Mississippi River—Gulf Outlet, Louisiana," "Garrison Dam and Reservoir Project on the Missouri River").

the same general location on the Niagara escarpment some distance east of the Lewiston plant. The Senate and House Committees, and the Congress, were told on numerous occasions from 1950 to 1957 of the purpose and operation of the pump-storage reservoir, and its indispensable role in storing excess flow in order to provide dependable power during the daytime hours of peak demand (p. 5, *supra*).[17]

The only variation in the descriptions of the pump-storage reservoir to Congress lay in the proposed size.

---

[17] *E.g.*, S. Rept. 1408, 84th Cong., 2d sess., p. 5; H. Rept. 2635, 84th Cong., 2d sess., p. 10; S. Rept. 2501, 83d Cong., 2d sess., p. 5; Hearings on Development of Power at Niagara Falls, N.Y., before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st sess., p. 71; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 11–14; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 19–20, 28–29, 66, 74–75; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 34, 66, 77; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 13, 23, 121; Hearings on Niagara Falls and River, N.Y., before the House Committee on Public Works, 81st Cong., 1st sess., pp. 11, 30, 39, 75; 102 Cong. Rec. 8077, 8156, 8237; 99 Cong. Rec. 8385. See also S. Doc. 113, 84th Cong., 2d sess., pp. 30–31; Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949), pp. 42–43.

Any reduction in the volume of the reservoir will decrease the firm kilowatt capacity in a roughly linear proportion for most of the relevant figures (R. 225–226). Correspondingly, the Corps of Engineers had advised Congress that increase in power production would call for a larger reservoir (then expected in a later development stage, with regulation of Lake Erie level). S. Doc. 113, *supra*, pp. 11, 41.

Up to 1956, the plans for the reservoir varied between 22,000 acre-feet storage capacity covering 850 acres, suggested in the Bureau of Power 1949 report and incorporated in the later proposal of Niagara Mohawk and four other private utilities;[18] 30,000 acre-feet covering 1,100 acres recommended by the Corps of Engineers;[19] and 41,000 acre-feet covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reser-

[18] Bureau of Power, *Possibilities for Redevelopment of Niagara Power* (1949), pp. 42–44, and maps at frontispiece, Exhibits 8, 9, 10. The private utilities' plan for a storage reservoir was presented in the Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., p. 78 (and map following). This size pump-storage reservoir is also set forth in H. Rept. 862, 85th Cong., 1st sess., p. 6; S. Rept. 1408, 84th Cong., 2d sess., p. 5; H. Rept. 2635, 84th Cong., 2d sess., p. 10; S. Rept 2501, 83d Cong, 2d sess., p. 5; Hearings on Niagara River Power Project before a Subcommittee of the Senate Committee on Public Works, 84th Cong., 1st sess., p. 74; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 34, 69–70 (maps), 77; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 16–17 (maps), 121; Hearings on Niagara Falls and River, N.Y., before the House Committee on Public Works, 81st Cong., 1st sess., p. 11. See fn. 7, *supra*.

[19] S. Doc. 5, 84th Cong., 2d sess., pp. 7, 14, 30–31, 33, 36, 41; maps following p. 45, Sheets 2, 6, 7. This size pump-storage reservoir is set forth in S. Rept. 539, 85th Cong., 1st sess., p. 5; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 11–14; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 13–14, 25, maps following p. 16. See fn. 9, *supra*.

vation," proposed by the New York State Power Authority.[20]

After the Schoellkopf plant was largely demolished in June 1956 (*supra*, p. 9), an additional 20,000 cubic feet of water per second—in other words, *all* the United States share—became available for use in the proposed Niagara Project. Again, Congress was amply informed of the fact that the Schoellkopf disaster meant a larger development at Lewiston and that this in turn included a 60,000 acre-feet storage reservoir, considerably larger than previously envisaged. The 1957 Committee reports stated that the plans had been revised by the New York Power Authority in order to utilize all the treaty waters and the Project was therefore increased to an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be firm dependable power on a 17-hour daily basis. S. Rept. 539, 85th Cong., 1st sess., pp. 5–6; H. Rept. 862, 85th Cong., 1st sess., pp. 6–7.[21]

---

[20] New York State Power Authority, Niagara Power and Park Development (1954), "Project Features", set forth in Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 131–132, 134–135; see S. Doc. 113, 84th Cong., 2d sess., pp. 6, 11; R. 251–252, 254–257, 273–274. The location of the Authority's proposed reservoir is quoted from the Hearings, *supra*, p. 132.

[21] The estimates of the Project's dependable capacity prior to the Schoellkopf disaster varied from 1,240,000 kilowatts to 1,723,000 kilowatts, partly due to differing assumptions as to the period of peaking required. See Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st. sess., p. 135; Bureau of Power, *Possibilities for Redevelopment of Niagara Falls for Power* (1949), pp. 8, 47–48; S. Doc. 113, 84th Cong., 2d sess., pp. 7, 31, 41.

The Niagara redevelopment bill was reported out June 27,

The 1957 Congressional Committee reports continued that "in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required." S. Rept. 539, 85th Cong., 1st Sess., p. 5; H. Rept. 862, 85th Cong., 1st Sess., p. 7. It would certainly be deduced from the indispensability of pump-storage support for dependable power (pp. 5, 9–10, 31, fn. 17, *supra*) that the increased dependable capacity—which Congress approved—would require a larger reservoir than had previously been considered.

1957, by the Senate Committee on Public Works (S. Rept. 539, 85th Cong., 1st sess.) with these statements (pp. 5–6):

"The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required. * * *

There is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by the Corps of Engineers, the Bureau of Power of the Federal Power Commission, the Niagara Mohawk Power Corporation, and the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station."

The full capacity proposed by the Power Authority was also accepted by the House Committee on Public Works in its report of July 23, 1957 (H. Rept. 862, 85th Cong., 1st sess., p. 7):

"As a result of the disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required. * * *"

Moreover, the revised plans developed by the New York Power Authority after the Schoellkopf disaster were explicitly shown to Congress by the Authority's presentation of its 26th Annual Report (Exhibit 191, R. Ex. 35–44) and its application for a license (including Exhibit 13, R. Ex. 1–9) at the Senate hearings of April 1957 (R. 3, 262–267, 271–272, 280–281, 383–385), and by submission of a brochure on the power emergency in the Niagara area (Exhibit 218, R. Ex. 131–149) to the House Committee and to all Senators and Representatives in July 1957 (R. 244–250; Exhibits 219–221, R. Ex. 151–154). Exhibit 191 charted out the project, including a clearly larger reservoir than shown on maps previously presented to Congress (R. Ex. 42–44).[22] Exhibit 13 analyzed the fluctuations in the flow of water available, and, with supporting computations, declared that a reservoir of 60,000 acre-feet was required to maintain a dependable capacity of 1,800,000 kilowatts (R. Ex. 4, 5, 6). Finally, Exhibit 218 listed the revised specifications for all the project works, including the generators of increased capacity

[22] Compare R. Ex. 42–44 with the maps shown in S. Doc. 113, 84th Cong., 2d sess., Sheets 2, 6, 7 (submitted to Congress—see fn. 9, *supra*); Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., maps following pp. 16, 78; Hearings on Niagara Falls and Niagara River, New York, before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 69–70; Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 16–17.

and a "Reservoir—Storage Capacity 60,000 Acre-Feet" (R. Ex. 132).

The court below mistakenly cited Senator Chavez's statement on August 12, 1957, that "No dams or provisions for storage of water are necessary" (R. 426). But the Senator meant only, as he immediately explained, that at Niagara Falls—unlike other developments—no artificial means were required to provide the basic flow for power purposes: "That storage is provided by the Great Lakes * * *. The power head is provided by the fall in the river * * *." 103 Cong. Rec. 14438. Senator Chavez, who had been chairman or member of the Senate Committee on Public Works from 1950 to 1957, clearly did not intend to disclaim the continued uniform legislative understanding that a pump-storage reservoir was indispensable to firm up the Project's dependable capacity.

Accordingly, Congress plainly comprehended the whole project works within its authorization of a Niagara power development utilizing *"all"* the waters available. In fact, this general objective had been translated into precise statistics—1,800,000 dependable kilowatts on a 17-hour basis and a 60,000 acre-feet storage reservoir.

2. Moreover, we submit that in Public Law 85–159 Congress clearly set aside any provision of the Federal Power Act which might restrict a development of this contemplated size.

Reading Public Law 85–159 against the legislative debates of the seven years following the 1950 treaty, it is immediately evident that the 1957 Act represents

a Congressional determination of the broadest possible scope, not the meager legislation supposed by the Court of Appeals for the District of Columbia Circuit. The salient contested issues throughout this period were matters of power policy. First, whether Niagara power should be developed by private companies, the New York Power Authority or, at least initially, by a federal body. Second, whether the Niagara development should serve as a public power "yardstick"—with preference for municipalities and cooperatives in New York and neighboring states, its own transmission lines, and control over resale rates. The Act's direction on each of these disputed points was "specific".[23] The Commission was instructed "to issue a license to the Power Authority of the State of New York". Section 1(a) of Public Law 85-159, *infra*, p. 76. The licensing conditions prescribed in Section 1(b) of the Act, *infra*, pp. 76-79, resolved all the "yardstick" issues and, also, the other open questions of allocation of costs and supply of electric power to Niagara Mohawk (see the Statement, p. 10, *supra*).

While in the absence of any then controversy Congress did not lay out the project works in detail, its command for "a power project with capacity to utilize all of the United States share of the water of the Niagara River" (Section 1(a), Public Law 85-159) constituted a shorthand direction for, among other

[23] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 894 (C.A. 2), certiorari denied, 358 U.S. 841. The Second Circuit's reference to the specific instruction on the licensee is equally applicable to all other disputed issues.

things, 1,800,000 dependable kilowatts and a 60,000 acre-feet storage reservoir. As we have seen, all essential engineering elements were foreseen by Congress, along with all essential questions of power policy (pp. 29–36, *supra*).

For convenience, Congress left the issuance of the license to the Commission, which could draw upon the Federal Power Act for additional conditions, administrative provisions, and general powers. Thus, Congress anticipated that some engineering details would be supplied under ordinary Federal Power Act criteria.[24] It also understood that the Power Act would supply auxiliary authority for execution of the project, including the power to condemn "lands or property of others necessary to the construction, maintenance, or operation". Section 21 of the Power Act, 16 U.S.C. 814 (see *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 890, 894). But this did not by any means dilute Congressional specification and authorization of the Niagara Project as

[24] The only substantial engineering point, previously raised, which was left open for the Commission to decide was the choice between tunnels, cut-and-cover conduits, or open canal to carry water through Niagara and Lewiston (see S. Doc. 113, 84th Cong., 2d sess., p. 9). This was later settled in the license proceedings (R. 395–399, 401; p. 11, *supra*). Other significant licensing conditions with respect to the project works dealt with minimization of interference with commerce and local activities during contruction, restoration of the surface area, development of fish and wildlife conservation facilities (R. 408–410). In addition, the Commission prescribed the annual charge to be paid by the licensee to the United States (R. 405). All other license conditions were derived from Public Law 85–159 and the previously contemplated project works.

planned. The essence of the Congressional decision was that the Power Act could not supply (or be utilized for) conditions or provisions which would conflict with the Niagara Project as authorized by Congress itself.

In passing Public Law 85–159, Congress clearly intended to supersede the Federal Power Act *pro tanto*, to the extent necessary to carry out Public Law 85–159. Congress was of course aware that it had taken over the decision of all disputed issues at Niagara (see S. Rept. 539, 85th Cong., 1st sess., pp. 1–3, 6–9; H. Rept. 862, 85th Cong., 1st sess., pp. 1–3, 7–9), despite proposals that it leave such matters to the Federal Power Commission and the Power Act.[25] And it knew,

[25] Senator Case had proposed that Congress should do no more than remove the treaty reservation (p. 7, *supra*) and thereby allow the Federal Power Commission to license the Niagara Project, applying the usual criteria of the Power Act. See S. 2599, 83d Cong., reported favorably in S. Rept. 2501, 83d Cong., 2d sess.; Hearings on Niagara Falls Power Development before the Senate Committee on Public Works, 83d Cong., 2d sess., pp. 450–451. The leading exponent of the opposing view was Senator Lehman, who urged that Congress itself should make the controlling decisions on large hydroelectric developments (and had done so in the past). Hearings, *id.*, pp. 86, 125–127, 418–420; Hearings on Niagara River Power Project before a Subcommittee of the Senate Committee on Public Works, 84th Cong., 1st sess., pp. 24–26; Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., pp. 231–232. Senator Lehman's view prevailed and while the bill which became Public Law 85–159 represented a compromise, it did resolve each of the issues debated.

As we have noted (fn. 5, *supra*, p. 7), in June 1957, the Court of Appeals of the District of Columbia Circuit ruled that the reservation in the Niagara Treaty with Canada was of no effect and that the Federal Power Commission could license the Niagara Project under the Federal Power Act without further

for one thing, that the preference directed for sales to municipalities and cooperatives was a flat departure from the Power Act, as previously construed;[26] supersession would automatically result from such repugnancy. The matter was not left to implication, for the superiority of Public Law 85–159 over any inconsistent terms of the Federal Power Act was expressly established. Section 2 of Public Law 85–159 (*infra*, p. 79) instructed the Commission to follow its regular procedures in issuing the license but "in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." Cf. H. Rept. No. 862, 85th Cong., 1st sess., p. 11.

Accordingly, regardless of its construction of the Power Act, the Commission, acting under Public Law 85–159, could not issue a license to any applicant other than the New York Power Authority, nor could it

---

legislation. *Power Authority of New York* v. *Federal Power Commission*, 247 F. 2d 538 (C.A. D.C.), vacated as moot, *American Public Power Association* v. *Power Authority of New York*, 355 U.S. 64. The House Committee took note of this decision but favored legislative action resolving all points nevertheless. H. Rept. 862, 85th Cong., 1st sess., p. 4.

[26] The proponents of the preference for municipalities and cooperatives, urging its adoption, pointed out under the ordinary provisions of the Power Act the license would not contain it. In the St. Lawrence power proceeding, the Federal Power Commission had ruled that the Power Act did not give it authority to direct the inclusion of such preference as a license condition. *In the Matter of Power Authority of the State of New York*, 12 F.P.C. 172, 177–179, 194–197; Hearings on Niagara Falls Power Development before the Senate Committee on Public Works, 83d Cong., 2d sess., pp. 114, 124–125, 153–154, 158–159, 169–171. See S. Rept. 1408, 84th Cong., 2d sess., pp. 7–8, 12.

deny the preference to municipalities and cooperatives for 50% of the power produced, or refuse to allow a sale of 445,000 kilowatts to Niagara Mohawk, and so forth. By the same token, the Commission had no authority to limit the license to partial utilization of the available waters—*i.e.*, for production of less than 1,800,000 dependable kilowatts—even if the Commission had believed that such a restricted power use would have been "best adapted to a comprehensive plan for improving or developing a waterway" under Section 10(a) of the Power Act, 16 U.S.C. 803(a), or that it was compelled by restrictions upon the eminent domain power which would ordinarily have been applicable. For the 1957 Act explicitly commanded "a power project with capacity to utilize all of the United States share of the water of the Niagara River", and any contrary provision of the Power Act would have to fall.

B. THE TUSCARORA LANDS MAY BE TAKEN, REGARDLESS OF THE PROVISO OF SECTION 4(e) OF THE POWER ACT, BECAUSE THEY ARE INDISPENSABLE TO THE PROJECT CONTEMPLATED BY CONGRESS AND THEIR USE WAS FORESEEABLE

1. The judgment below eliminating Tuscarora lands from the pump-storage reservoir was based upon the ruling that those lands constitute part of a "reservation" as defined in the Power Act, and that under a proviso in Section 4(e) of that Act, 16 U.S.C. 797(e), licenses for projects using such lands may be issued only after a finding, not present here, "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or ac-

quired * * *." We believe this ruling was erroneous, as we shall show in Point II, *infra*. However, even if the 4(e) proviso would otherwise be applicable to the Tuscarora lands, we submit that it cannot operate to impair the development of the full capacity of the Niagara Project. As we have shown above (pp. 28–41), Congress clearly comprehended a storage reservoir of 60,000 acre-feet as a necessary element of "a power project with capacity to utilize all of the United States share of the water of the Niagara River" (Public Law 85–159, *infra*, p. 76); and if any provision of the Federal Power Act would compel reduction of the storage reservoir, and hence of the dependable capacity of the Niagara Project, such provision was necessarily superseded by Public Law 85–159.[27]

When the Court of Appeals below remanded this case to the Power Commission to explore the possibility of a Section 4(e) finding, it apparently did not anticipate any inconsistency between the Power Act and the objective of Public Law 85–159. It stated: "On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope" (R. 431). However, the

[27] Moreover, the congressional and administrative determinations that the water resources should be used in the Niagara Project, that the development requires a pump-storage reservoir, and that Tuscarora lands are essential, are not subject to judicial review, at least so long as they had reasonable basis. *Berman* v. *Parker*, 348 U.S. 26; *Chapman* v. *Federal Power Commission*, 345 U.S. 153, 171; *United States* v. *Carmack*, 329 U.S. 230, 242–248; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

proceedings upon remand established these crucial facts—(1) that no Section 4(e) finding could be made to permit use of Tuscarora lands under the ordinary Power Act criteria; (2) if any doubt had existed, that a reservoir with storage capacity of 60,000 acre-feet was required to utilize the United States share of water and any reduction would reduce the Project's firm capacity below 1,800,000 kilowatts; and (3) that the Tuscarora lands were indispensable to a reservoir with storage capacity of 60,000 acre-feet.

The first of these crucial facts consisted of the Commission's decision that the use of Tuscarora lands would interfere and be inconsistent with the reservation purposes, and, therefore, that if the proviso of Section 4(e) controlled, the taking of those lands could not be justified (R. 488–489). The second critical fact of the indispensability of a 60,000 acre-feet reservoir to a Niagara Project with 1,800,000 kilowatts dependable capacity had been developed upon the original grant of license (R. 3, 394; R. Ex. 4, 5, 6) and was reaffirmed by the Commission upon the remand, after receiving additional proof (R. 224–227, 230–231, 487–488).

As for the third crucial fact, the indispensability of the Tuscarora lands to a 60,000 acre-feet reservoir was established by exhaustive studies of all alternative locations, conducted by the New York Power Authority's engineering consultants. After eliminating a "dumbbell" shaped storage and others, the engineers narrowed the possibilities to those four shown on Exhibits 162, 163, 164 and 165. Of these, all but

Exhibit 165 were then eliminated because of engineering and topographical problems, excessive size or irregular shape, drainage losses, and community displacement (R. 25–36, 46–47; R. Ex. 15–21). Ultimately, even the Exhibit 165 plan, the best of the alternatives, was found to be entirely infeasible.[28]

That alternative plan would impose large additional costs on the Niagara Project. Instead of 1,383 acres and 37 homes from the Tuscarora lands (p. 13, *supra*), the Exhibit 165 plan would take 1,721 acres to the south, including about 440 homes, a million-dollar school, a church, two cemeteries and one store and home (Exhibit 189, R. Ex. 31; R. 49–51, 101–102, 105, 487). The land, buildings and improvements on the area to be substituted for Indian lands were appraised at $12,880,000 (R. 48), and the actual cost would be considerably greater, since it would include relocation of most of the homes and two cemeteries (R. 125, 150–151, 152–153).[29]

---

[28] Comparison of the licensed reservoir (Exhibits J, 161, R. 417, R. Ex. 13) with the alternatives is facilitated by material in the record. On Exhibits 162, 163, 164 and 165 (R. Ex. 15–21), the lighter areas are those substituted for the Tuscarora lands. Further, a map and an aerial photograph (Exhibits 189, 190, R. Ex. 31, 33) show the relation between the lands needed for the best of the alternatives (the plan on Exhibit 165) and the licensed reservoir.

[29] Relocation of structures is more expensive than purchase (R. 153). Most of the 445 homes in the alternative area on Exhibit 165 are relatively new and the Power Authority would have to move them; the school would be demolished (R. 125, 150–151, 153). The cost of moving the cemeteries (about 3,000 graves) would be about $400 per grave plus other improvements and purchase of the site (R. 109, 130–131).

In comparison, the land and improvements on the Tuscarora lands were appraised at $980,000, and only about 65 percent of 37 homes would be moved (R. 72–73, 110, 124). To this difference must be added an increase in the cost of the reservoir and of transmission lines,[30] the cost of a substantial delay in construction (R. 487),[31] and what the Commission found to be the "unreasonable expense" of rerouting a main highway and, in some alternative possibilities, railroad tracks (R. 487).[32] The evidence developed showed that the comparative costs were not merely matters of "economy" as the court below initially believed (R. 431), but were so disproportionate as to affect the reasonableness of the alternative plans. Cf. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554.

---

[30] Aside from land values and other items, the construction of the reservoir on Exhibit 165 will itself cost about $3,500,000 more than the licensed reservoir, because of topographical and drainage problems (R. 37, 46). In addition, a longer transmission line will be required, which would have cost $300,000 more at the outset (R. 39–40, 95) and will now cost about $1,200,000 more, including relocation of previous work (R. 40, 96–97).

[31] The Power Authority's general manager estimated that interest charges were 70-odd thousand dollars a day (R. 279). Just the relocation of the large number of buildings and residents from the alternate site would take two to three years after the land was acquired (R. 150, 241). As the general manager testified, delay will affect the rate base of future power production (R. 279, Tr. 4948).

[32] Exhibit 165 would approach, but not sever, the railroad tracks at its southern boundary (Exhibit 189, R. Ex. 31). These tracks constitute a main line of the New York Central Railroad, connected with marshalling yards, and part of a grade-crossing elimination program. Their present location was one of the limiting factors to all alternatives seriously considered. R. 26, 129–130, 239–240.

Moreover, an insuperable obstacle is presented by the community disruption which would be caused by the Exhibit 165 alternative. Earlier, the Commission had rejected an open canal 200 feet wide through Lewiston and Niagara Falls because of the deleterious effect upon the town's development, despite proposed bridges and crossings (p. 11, *supra*). The reservoir in Exhibit 165, which cannot be bridged, would have much graver consequences, as numerous witnesses testified. It would "dismember" the town of Lewiston, preventing its orderly development and cutting off water, sewage, fire protection, and other utilities and services to a substantial area (R. 121–123, 140–142, 144–148, 208–222, 237–239, 487). It would also sever the main highway which connects Lewiston and Niagara Falls to the county seat at Lockport, requiring a roundabout detour (R. 17–18, 103, 215, 219).

Combining the cost factors with the disruptive impact upon the area, it is clear that no real alternative exists to the Project as licensed. The general manager of the Power Authority testified that Exhibit 165 did not present a feasible plan, that there is no alternate site for the pump-storage reservoir, and that if the Tuscarora lands were eliminated the Authority would have to use a smaller reservoir (R. 268, 283–285). The Commission specifically found that omitting the Indian lands from the reservoir as licensed would cut its storage volume by half, to 30,000 acre-feet, resulting in a loss of 300,000 kilowatts of dependable capacity of the Niagara Project (R. 488). While the New York Power Authority has since applied to redesign the reservoir to raise the dikes and avoid

one-half of the storage loss, a serious detriment is unavoidable. The proposed modification would still result in a loss of 150,000 kilowatts of dependable capacity from the 1,800,000 kilowatt project expressly contemplated by Congress.[33]

The result of the decision below, in short, is that the Niagara Project will not utilize all the waters made available by the treaty with Canada if the requirements of Section 4(e) of the Power Act must be met. This consequence of a conflict between the Power Act and full utilization of Niagara waters was, we have shown, expressly precluded by Public Law 85–159. The District of Columbia Circuit erred when it failed to prefer Public Law 85–159.[34]

---

[33] Some of the technical and cost problems involved in raising the reservoir dikes above the level in the Project as licensed were indicated in testimony at the hearings preceding issuance of the license (R. 5–11, 394). On remand, the Commission found that raising the dikes to make a storage capacity of 60,000 acre-feet "is technically infeasible and is economically undesirable" (R. 488). The Power Authority now proposes to attain a storage capacity of 45,000 acre-feet. Its application was filed on March 2, 1959, and has not yet been acted upon by the Commission.

[34] The court below held that the 4(e) proviso was applicable under the provision of Public Law 85–159 authorizing the inclusion, along with the seven specified "licensing conditions", of "those deemed necessary and required under the terms of the Federal Power Act" (R. 425, 428). But the general licensing "conditions" of the Power Act are set forth in its Section 10, 16 U.S.C. 803 (App., *infra*, p. 81); consequently, the only conditions under the Power Act which may be deemed necessary and required for the Niagara Project are those arising from Section 10, and not inconsistent with Public Law 85–159. The limitation on the utilization of land in a "reserva-

2. The Second Circuit, in sustaining the State Authority's power to condemn Tuscarora lands, recognized as a possible ground therefor the point just discussed—"the impracticability of constructing [the project] without taking a portion of the Tuscarora Reservation". *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 893. However, without making any findings on the indispensability of the lands to the authorized development, the Second Circuit found that Congress had impliedly sanctioned the challenged condemnation. Because of the size and extent of the project, the contemplated necessity for a pump-storage reservoir, and the proximity of the Indian lands, the likelihood that these lands would be taken was found to have been within the Congressional knowledge and intent. 257 F. 2d at 893–894.

The Second Circuit found that "it may be assumed" that Congress had general knowledge of the terrain and of the existence of the reservation in the vicinity. 257 F. 2d at 894. This is buttressed by the fact that maps of New York State or of the locality clearly delineate the Tuscarora lands east of Lewiston in the approximate reservoir location. *E.g.*, Encyclopedia Britannica, World Atlas (1942 ed.), Map No. 172–173; 20 Encyclopedia Americana (1958 ed.), map following p. 202; Rand McNally, Commercial Atlas and Marketing Guide (Centennial ed. 1956), p. 310. In fact, the Corps of Engineers report on the Niagara Project to

---

tion" is contained in Section 4(e) of the Power Act, not Section 10, and, thus, should not be applicable even apart from the supersession which results from the conflict with Public Law 85–159.

the Senate Committee on Public Works explicitly referred for background information to a government survey map (among others) which shows the Niagara River area and the Tuscarora Reservation. U.S. Lake Survey, Chart No. 31 ("Lake Erie"), cited in S. Doc. 113, 84th Cong., 2d sess., p. 22.[35]

In addition, the Power Authority's initial proposal for a pump-storage reservoir of 41,000 acre-feet, covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reservation," was plainly described to the House Committee in 1955. Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st sess., p. 132. When Congress was later told that the reservoir was being increased to 60,000 acre-feet after the Schoellkopf disaster (pp. 9–10, 33–36, *supra*), it must have been anticipated that Indian lands were involved.

The rough map of the enlarged reservoir in Exhibit 191 (R. Ex. 42–44), presented to Congress in 1957, did not indicate any property lines. However, before the Federal Power Commission, the Power Authority's resident engineer testified without contradiction that from the roads indicated (including Whitmer Road and Military Road—R. Ex. 42), anyone familiar with the area would have realized that

---

[35] Repeated Congressional reference to the report of the Corps of Engineers has already been noted, fns. 9, 19, *supra*. See, also, for other government maps of the area, U.S. Geological Survey: Eastern United States 1:250,000, Map No. NK 17–3 (30–M) ("Toronto"); New York 1:25,000, Maps Nos. 5170 II NE, 5170 II SE, 5270 III NW ("Lewiston," "Niagara Falls," "Ransomville").

Indian land was involved (R. 151, 157–158). The same map was printed in the local Niagara Falls newspaper in January 1957 (Exh. 187, R. Ex. 29) and mailed to responsible members of the Tuscarora Nation in January and February 1957, along with the explicit information that the reservoir as planned included a portion of the Tuscarora Reservation (Exhibits 192, 193, R. Ex. 45–46; R. 110–112). Thereafter, in March 1957, the Power Authority sought the tribe's permission to survey land (Exhibits 186, 193, R. Ex. 27–28; R. 112). (*Supra*, p. 15). The silence of the respondent Nation after it was put upon notice that use of its lands was contemplated further detracts, we submit, from the force of its insistence that Congress did not show any overt awareness that Indian lands were involved when Public Law 85–159 was passed in August 1957.[28]

The District of Columbia Circuit apparently believed that testimony before Congress in 1956 indicated that all project lands belonged to the Niagara Mohawk Power Company (R. 426). This is not so. While a Corps of Engineers official made such a statement in response to queries by Representative Dondero, the counsel for the Power Authority immediately testified, in contradiction, that only part was Niagara Mohawk's. Hearing on Niagara Power Before the House Committee on Public Works, 84th Cong., 2d sess., pp. 11–12, 27–28; R. 260–261. Most significant, there was never any issue over the power to con-

[28] At the time the Authority presented its plans to Congress, there was apparently no reason to believe that any problem would arise over acquisition of the Tuscarora lands.

demn any property needed, an authority which the Power Authority counsel then asserted. Hearings, *id.*, pp. 23–24, 28, R. 257–259. Rather, Niagara Mohawk's alleged ownership was cited in 1956 and earlier by Representative Dondero and other congressmen who favored private development at Niagara only to stress the ability of the private utilities to proceed, and the alleged interference with private enterprise.[37] Actually, Niagara Mohawk owned only 42% of the land required for the Project as finally licensed (Exhibit 18, R. Ex. 11; R. 290). As we have shown, the Tuscarora lands now in question were among the other lands use of which is indispensable to the Project, was reasonably foreseeable, and hence was authorized by Congress.

C. NO OBSTACLE IS PRESENTED TO THE USE OF TUSCARORA LANDS BY GENERAL RULES GOVERNING ACQUISITION OF INDIAN LANDS

Congress did not, in Public Law 85–159, establish an independent power of eminent domain applicable to the Niagara Project. It relied upon the licensee's power under Section 21 of the Power Act, 16 U.S.C. 814. However, we have shown that Public Law 85–

[37] See, *e.g.*, Hearings, *ibid.*, and the congressmen's previous remarks concerning Niagara Mohawk's ownership of lands in Hearings on Niagara Power Development, before the House Committee on Public Works, 84th Cong., 1st sess., p. 102; Joint Hearings on Niagara Power Development before the Subcommittee on Flood Control and Rivers and Harbors of the Senate Committee on Public Works and the House Committee on Public Works, 83d Cong., 1st sess., pp. 44, 70, 129–130; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., p. 144; 99 Cong. Rec. 8386–8387; see H. Rept. 713, 83d Cong., 1st sess., p. 5.

159 superseded any limitation arising from the proviso in Section 4(e) of the Power Act upon the exercise of eminent domain applicable to Tuscarora lands. In our view, this conclusion is compelled (as we have seen) by the terms of the 1957 Niagara Development Act, the indispensability of the Tuscarora lands to the statutory objective, and the extent of Congressional knowledge and anticipation. Moreover, there is nothing in the law applicable generally to Indian lands which militates against this result.[38]

1. Even when Indian treaty obligations are thereby overridden (which is not the case here—see pp. 55–57, *infra*), Congress may authorize the taking of Indian lands by eminent domain. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 116–118. And it has been repeatedly held that such authorization does not require that Congress expressly desig-

[38] There is no Congressional indication in the background of Public Law 85–159 that Indian rights were to be a special exception to full utilization of the Niagara River. On the contrary, a representative of the Seneca Nation appeared in the 82d Congress hearings and asserted that the development was precluded by his tribe's claim to a one-mile strip, including the Niagara River, on the ground that transfers in 1802 and 1815 were invalid. The committee members told him that he had come to the wrong tribunal, that it was a judicial question; members of the House Committee specifically said the claim was for adequate compensation upon condemnation. See Hearings on Niagara Power Development before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 82d Cong., 1st sess., pp. 163–166; Hearings on Niagara Falls and Niagara River, N.Y., before a Subcommittee of the Senate Committee on Public Works, 82d Cong., 1st sess., pp. 182–188.

nate the Indian lands. The Federal Power Act's special condition for certain Indian lands (Point II, *infra*) sufficiently shows that Indian lands generally, when needed and appropriate for licensed developments, are covered by that Act's eminent domain provision. Cf. *Kindred* v. *Union Pacific R.R. Co.*, 225 U.S. 582, 596; *Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614 (C.A. 9). Moreover, even if we consider Public Law 85–159 alone, this Court has on a number of occasions found the necessary Congressional authorization from two factors amply demonstrable in this case—the necessity to use Indian lands for a project specifically authorized by Congress, or the presumption that Congress knew of Indian lands in the vicinity. *Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*, 160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118; cf. *Ward* v. *Race Horse*, 163 U.S. 504, 514–515; *Beecher* v. *Wetherby*, 95 U.S. 517, 526.[39]

Thus, the taking of Indian reservation lands was authorized by the grant of a railroad right-of-way which "necessarily involved their possession", despite the absence of any showing that Congress had been

[39] Some recent lower-court cases have also sustained condemnation of Indian lands by supplementing the statutory grants (which were silent on the subject) with legislative histories which specifically mentioned the Indian lands to be taken. *Seneca Nation of Indians* v. *Brucker*, 162 F. Supp. 580 (D. D.C.), affirmed, 262 F. 2d 27 (C.A. D.C.), certiorari denied, 360 U.S. 909; *United States* v. *21,250 Acres of Land*, 161 F. Supp. 376 (W.D. N.Y.); *United States* v. *5,677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.).

aware of that necessity (*Missouri, Kansas & Texas Ry. Co.* v. *Roberts, supra,* 152 U.S. at 117). The general terms of the Reclamation Act of 1902 were sufficient as against Indian lands "when necessary for reclamation purposes" (*Henkel* v. *United States, supra,* 237 U.S. at 50). And a grant for a specific canal superseded Indian treaty rights on the canal route, the Court stating (*Spalding* v. *Chandler, supra,* 160 U.S. at 406–407):

> * * * Whatever the reason * * * for the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty, and *as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass,* the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes. * * * [Emphasis added.]

We have already shown the necessity, the indispensability, of Tuscarora lands to the Niagara Project contemplated by Congress (*supra,* pp. 42–47); this indispensability brings this case within the controlling authorities we have just discussed.

Furthermore, as a second independent ground, the Second Circuit's view that Congressional authorization arises from presumed knowledge of the Tuscaroras' location (pp. 48–51, *supra*) is also supported by decisions of this Court. In *Henkel* and in other cases, the Court presumed that Congress knew Indian

lands might be involved, and had impliedly included them, because of the scope of the projects (or other legislative objectives) in areas in which reservations were located. See *Henkel* v. *United States, supra,* 237 U.S. at 49; *Ward* v. *Race Horse, supra; Beecher* v. *Weatherly, supra.*[*]

2. While Public Law 85–159 is thus sufficient to authorize the taking of Tuscarora lands even under the general rule governing acquisition of treaty reservations, the requirements in this case are much less stringent. Both the court below and the Second Circuit recognized that the Tuscarora lands sought for the Niagara Project are not part of a reservation created by treaty, statute, or executive order, but were purchased by the tribe with its own funds. R. 429; *Tuscarora Nation of Indians* v. *Power Authority,* 257 F. 2d 885, 887 (C.A. 2), certiorari denied, 358 U.S. 841; see S. Rept. 1836, 81st Cong., 2d sess., p. 2; see the Statement, pp. 13–15, *supra.* These lands are protected by the statutes prohibiting alienation of In-

[*] In *Spalding* v. *Chandler*, 160 U.S. 394, 406, the Court found support for Congress' knowledge of the reservation's existence from a law passed two years before the canal grant, which authorized a survey of the area and specifically included the reservation.

Similarly, in the instant case, Congress in 1950 and 1948 passed laws dealing with civil and criminal jurisdiction of New York state courts over Indians and Indian reservations, which were clearly based upon explicit knowledge that the Tuscaroras were one of the "recognized tribes" and "reservations" referred to in those statutes. Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. 233; Act of July 2, 1948, 62 Stat. 1224, 25 U.S.C. 232. See S. Rept. 1836, 81st Cong., 2d sess., pp. 3, 5; H. Rept. 2355, 80th Cong., 2d sess., p. 3.

526319—59——5

dian lands without federal approval (25 U.S.C. 177, 233; R. 423–424; 257 F. 2d at 888–889), but that legislation presents no obstacle to the exercise of the federal power of eminent domain authorized by Congress.

The restraint upon alienation is inapplicable here because it does not in terms limit the sovereign (*Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *Wittek*, 337 U.S. 346, 359; *Grand River Dam Authority* v. *Federal Power Commission*, 246 F. 2d 453, 455 (C.A. 10)). Moreover, since the restraint was intended to impose federal supervision so as to prevent sharp dealing by private persons, its purpose would not extend to federal condemnation proceedings with their assurance of just compensation (see *United States* v. *Candelaria*, 271 U.S. 432, 441–442; *Alonzo* v. *United States*, 249 F. 2d 189 (C.A. 10), certiorari denied, 355 U.S. 940). As the Second Circuit held on this very point, "the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question." *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 893.

In this case, it is clearly the federal eminent domain power which is being exercised by the Power Authority under Public Law 85–159 and the Federal Power Act.[41] As long as those statutes are satisfied, we sub-

[41] See *First Iowa Coop* v. *Federal Power Commission*, 328 U.S. 152, 181, n. 25; *Kohl* v. *United States*, 91 U.S. 367, 373–374; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 890, 894.

mit that there is full authority to take any Tuscarora lands designated in the project license. The statutory restraint upon alienation, unlike a treaty, does not impose any independent requirement of Congressional action with respect to the particular Indian lands sought to be taken by federal condemnation. Condemnation by or on behalf of the Federal Government is adequate compliance.

If it be argued, however, that the use of lands in an Indian reservation (even without a treaty) should be protected as a prior public use, there are two answers. The first is that a federal use supersedes any others (*United States* v. *Carmack*, 329 U.S. 230), and the hydroelectric use here is definitively a federal use of prime importance. Second, the rule is that a general grant by Congress of condemnation power extends to property already devoted to an equivalent public use if the authorized project requires, for its execution, the taking of such property. *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799–800 (S.D. Ill.), affirmed, 252 F. 2d 354, 356 (C.A. 7); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (W.D. Mo.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 373 (E.D. Ill.). Cf. *United States* v. *South Dakota*, 212 F. 2d 14, 16 (C.A. 8). Again, the abundant proof of the indispensability of the Tuscarora lands to the Niagara Project (*supra*, pp. 42–47) also satisfies this requirement, if it exists.

II

THE TUSCARORA LANDS, FULLY OWNED IN FEE BY THE TRIBE, ARE NOT A PART OF A "RESERVATION OF THE UNITED STATES" WITHIN THE SPECIAL MEANING OF SECTION 4(e) OF THE FEDERAL POWER ACT AND MAY BE CONDEMNED LIKE OTHER NON-FEDERAL LANDS UNDER THAT ACT

Apart from the Congressional purpose to supersede the Federal Power Act with respect to the Niagara project, this case also raises the question whether the proviso in Section 4(e) of that Act applies at all to Indian lands here involved. Both the court below and the Second Circuit recognized that the tract sought for the reservoir was purchased and is owned by the Tuscarora Nation in fee. R. 429, 430; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 887; pp. 13–15, 55, *supra*. While the manner of acquisition and holding may not be pertinent to the statutes restricting alienation (pp. 55–56, *supra*), an entirely different question is presented here—whether these lands constitute a "reservation" under the special provisions of Section 4(e) of the Power Act. We submit that the term "reservation" in that Act comprehends only lands owned in fee by the United States, or in which the United States has some real property interest, and not the Tuscarora area needed for the licensed Niagara Project.[42]

---

[42] On remand from the court below, the Commission ruled that, if the proviso of Section 4(e) were applicable, no finding of noninterference could be made to sustain the taking of the Tuscarora lands in suit. However, at the same time, it reaffirmed its earlier conclusion that these lands did not constitute a "reservation" under 4(e) and hence no finding was necessary (R. 413, 509).

A. *Definition of "Reservations" in the Power Act.*

1. Section 4(e) of the Power Act, 16 U.S.C. 797(e), authorizes the Federal Power Commission to license hydroelectric and other facilities "upon any part of the public lands and reservations of the United States" (among other areas—pp. 64, 80–81, *infra*). This general grant of power is followed by the limiting proviso here at issue—that licenses "within any reservation" may be issued only after a finding that the license will not interfere or be inconsistent with the reservation purposes and subject to conditions for its protection (*infra*, p. 81). It is thus clear, at the outset, that both the grant of power and the proviso of Section 4(e) apply only to "the public lands and reservations *of the United States*" (emphasis added). The special condition in Section 4(e) covering use of "reservations" for Power Act projects is limited, by its own terms, to those reservations which may properly be deemed to belong to the United States.

Second, there is a special definition of "reservation" in the Power Act which carries the same connotation and establishes that a definite title interest in the Government is needed. Section 3(2), 16 U.S.C. 796(2), provides:

> "reservations" means national forests, *tribal lands embraced within Indian reservations*, military reservations, and *other* lands and interests in lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands

> acquired and held for any public purposes; but shall not include national monuments or national parks. [Emphasis added.]

The plain purport of this definition is that, to constitute a "reservation" the lands must be "owned by the United States" and dedicated to certain uses, such as a national forest, military reservation, or as tribal lands within an Indian reservation. All the areas mentioned in Section 3(2) (leaving aside "tribal lands embraced within Indian reservations")—national forests, military reservations, "other lands and interests," "acquired" lands and interests—are indisputably federal lands in which the Government has a proprietary interest; if "tribal lands" can be non-federal (as respondent urges), they would be the only non-federal realty covered by the statutory definition of "reservation". In addition, the statute clearly conceives of "national forests, tribal lands embraced within Indian reservations, military reservations" as necessarily being federally owned because it goes on to refer to "*other*" federal lands and interests owned by the United States—a revealing term.[43]

---

[43] Section 3(1) defines "public lands" as "such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined".

Respondent has asserted that, under our reading of Section 3(2), "tribal lands" would be protected only if created "under the public land laws" and that most Indian reservations, having been created by treaty and agreement, would not be covered (Brief in Opposition, p. 23, n. 12). This is obviously not so. In Sections 3(1) and 3(2), the words "under the public land laws" refer only to the methods of the "private appropriation and disposal" from which "reservations" are ex-

Respondent's contention that the phrase "owned by the United States" does not modify "tribal lands" is likewise refuted by the legislative history of Section 3(2). In the original draft bill of the Federal Water Power Act of 1920, as proposed by the Administration and as passed by the House in the 65th and 66th Congresses, the definition read as follows:

> "Reservations" means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws, and lands and interest in lands acquired and held for any public purpose.

See H. Rept. 715, 65th Cong., 2d sess., p. 22; S. Rept. 180, 66th Cong., 1st sess., p. 10." The Senate then

---

cluded. The purpose was to exclude tribal lands *from* the provisions of the public land law, but it was not intended that the exclusion must be stated in the public land law itself. Lands are covered by Section 3(2) so long as they are excluded from disposition (under the public land laws) in any appropriate manner; they may be "withdrawn, reserved, or withheld", as the Section says, by any proper device. Our position is that "tribal lands" in Section 3(2), however created, are in effect modified both by the exclusion of ordinary disposition *and* by the phrase "owned by the United States".

Alternatively, the phrase "and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" can easily be read as if Section 3(2) stated: "other lands and interests in land owned by the United States provided that those *other* lands have been withdrawn, reserved or withheld from private appropriation and disposal under the public land laws."

"In the 65th Congress, the House substituted its bill, including authorization for projects on public lands and reservations and containing the quoted definition, instead of a Senate bill which applied only to navigable streams, not to federal lands. H. Rept. 715, 65th Cong., 2d sess., pp. 2, 3–4,

inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, *and other*" (emphasis added) at the beginning of the definition. See S. Rept. 180, 66th Cong., 1st sess., p. 10; 59 Cong. Rec. 1103.[48] When the House conferees accepted the Senate version, they explained the modification tersely: "This amendment recasts the House definition of 'reservations'." H. Rept. 910, 66th Cong., 2d sess., p. 7. It seems clear that no change in substance was intended or effected. The recasting merely specified, as illustrative, some of the federal "reservations." The phrase "owned by the United States" applies equally to all properties covered by the definition, as in the original draft bill, whether they now fall into one of the specified categories or into the residuary catch-all, "other lands and interests in land."

13–15; S. Rept. 179, 65th Cong., 2d sess., pp. 1–2. The House "reservation" provisions were accepted in conference (H. Rept. 1147, 65th Cong., 3d sess., pp. 2, 3–4) and the conference report was pending when Congress adjourned. The conference bill was reintroduced in the 66th Congress (H. Rept. 61, 66th Cong., 1st sess., pp. 1–2).

[48] The bill was enacted with this Senate amendment and the present form of the definition is the same, except for the deletion of the words "national monuments, national parks". The Act of March 3, 1921 (41 Stat. 1353) eliminated the Commission's authority under the Water Power Act to license any project works within national parks and national monuments. The quoted words were finally eliminated from Section 3(2) of the Act by amendment in 1935 (49 Stat. 838) conforming the definition of reservation to the restricted licensing power.

2. The court below did not disagree with this reading of the Act. It held, however, that the federal interest in protecting the Indians against improper alienation of their lands was a sufficient "interest in land" under Section 3(2) to bring the Tuscarora realty within the Power Act's limitation (R. 429–430). This conclusion is untenable. The United States, in its guardianship capacity, could sue to set aside unlawful alienations by Indians, but such protection of dependent peoples exemplifies only the sovereign's general concern with the public welfare (*Heckman* v. *United States*, 224 U.S. 413, 437–442; *United States* v. *Minnesota*, 270 U.S. 181, 194); it closely resembles, for example, actions by the United States as *parens patriae* on behalf of beneficiaries of charitable trusts. *E.g.*, *Mormon Church* v. *United States*, 136 U.S. 1, 56–62; *Mount Vernon Mortgage Corp.* v. *United States*, 236 F. 2d 724 (C.A.D.C.), certiorari denied, 352 U.S. 988; *Wallace* v. *Graff*, 104 F. Supp. 925, 926, 928 (D.D.C.).[46]

Characterizing the duty of guardianship towards Indians, this Court has said, "This national interest is

---

[46] In *Mount Vernon Mortgage Corp.*, the Court of Appeals below pointed out that the suit by the United States as *parens patriae* to rescind transfers by the trustees of a charitable corporation was "analogous to one brought to enforce a public right, and closely analogous to one brought to enforce a right of an Indian tribe." 236 F. 2d at 725.

In both situations, when the Government sues without having any property interest, title or possession is restored to the Indians or the other persons protected. Compare *Heckman* v. *United States*, *supra*; *United States* v. *Mount Vernon Mortgage Corp.*, *supra*, affirming 128 F. Supp. 629, 636 (D.D.C.).

not to be expressed in terms of property * * *", *Heckman* v. *United States*, 224 U.S. at 437. In contrast, the phrase "lands and interests in lands" in the Power Act expresses only a concept of real property law. Particularly is this true, since Section 3(2) also uses the word "owned" and lists Indian lands along with others in which the Government clearly has a real property interest. Ordinary canons of construction call for the interpretation of these terms in the Power Act to refer to the Government's property rights—*i.e.* present or potential title or possession—not its public or parental responsibilities.

B. *"Reservations" as a Basis for Licensing Jurisdiction.* Our view that federal ownership is fundamental is also buttressed, and its rationale provided, by the context of the Section 4(e) proviso. The proviso, as we have pointed out, is a limitation upon the general grant of authority to the Commission to license projects "[1] in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, *or* [2] upon any part of the *public lands and reservations of the United States* (including the Territories), *or* [3] for the purpose of utilizing the surplus water or water power from any Government dam * * *" (emphasis added) (*infra*, pp. 80–81). For Power Act purposes, therefore, the existence of "public lands and reservations" constitutes an *independent* jurisdictional basis for licensing federal projects, apart from the commerce power (which is the basis of the first grant of authority to the Commission).

As this Court ruled in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, the Power Act's licensing power "in relation to public lands and reservations of the United States springs from the Property Clause" of the Constitution—Article IV, Section 3. The constitutional basis for such licenses is provided by construing "reservation" in the granting portion of the Power Act, as this Court has therefore done, to mean lands which constitute "Property belonging to the United States" (in the words of Article IV, Section 3). This conclusion was further spelled out in *Federal Power Commission* v. *Oregon* when the Court referred to the difference in the "established meaning" of the terms "public lands" and "reservations" in the Power Act. The former were federal lands subject to appropriation and disposal under the public land laws; the latter were not so subject. In other words, a "reservation" consists of *federal* lands of a certain type, dedicated to a certain purpose, such as for use as an Indian reservation, 349 U.S. at 443–444. See also *United States* v. *Celestine*, 215 U.S. 278, 285.

In contrast, the Tuscarora lands do not in any way constitute federal lands, or "Property belonging to the United States".[27] The license in this case could not, therefore, have been based upon the Property

[27] For the principle that ownership by the United States of legal or trust title in an Indian reservation makes it federal property under Article IV, Section 3, see, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 284–285; *United States* v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329, 330–331 (C.A. 10), certiorari denied, 323 U.S. 804.

Clause to any extent, but only upon the federal power over navigable waters, as the Commission stated at the time of issuance (R. 400). And just as the Tuscarora lands do not constitute a "reservation" for the purpose of Section 4(e)'s grant of authority to license hydroelectric projects "upon any part of the public lands and reservations of the United States," so use of those lands is not limited by the "reservation" proviso which follows at the end of Section 4(e) and restricts the congressional grant of power to the Commission with respect to "reservations."

To avoid this conclusion, the Court of Appeals was constrained to expand the licensing jurisdiction of the Power Act. It held that, in authorizing projects upon "reservations," Congress included *all* Indian reservations, exercising not only its power under the Property Clause but also the power to regulate commerce with Indian tribes (R. 430–431). The language of the Act certainly is to the contrary, since any such jurisdiction would more appropriately have been added (but was not) to the clause dealing with interstate and foreign commerce, as it is in Article I, Section 8 of the Constitution.[46] With respect to its invocation of commerce power, Congress referred only to *waters* over which it had jurisdiction "under its authority to regulate commerce *with foreign nations and among the several States*"; it did not refer at all to commerce with the Indians, and certainly it did not purport in its exercise of commerce authority to utilize its Indian

[46] "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

commerce powers with respect to Indian lands unrelated to navigable waters. See *supra*, p. 64.

The legislative history of the Power Act's licensing jurisdiction clearly controverts any intent, drawn by the court below from the word "reservation", to authorize projects (where no navigable stream is involved) upon lands entirely owned by Indian tribes. The Congressional statements setting forth the basis for federal power developments, leading up to the passage of the original Water Power Act of 1920, uniformly and explicitly refer to two heads of jurisdiction only—the commerce power over navigable streams, and the federal jurisdiction over the public domain under the Property Clause. These two constitutional bases had, indeed, previously prompted two separate bills, "one for navigable streams and * * * one for streams in the public domain" (59 Cong. Rec. 7733). The 1920 Act combined these proposals, just as it combined the authorities and efforts of the several cabinet departments and congressional committees exercising such jurisdictions. See, *e.g.*, H. Rept. 61, 66th Cong., 1st sess., pp. 3–5; S. Rept. 180, 66th Cong., 1st sess., pp. 5–6; H. Rept. 715, 65th Cong., 2d sess., pp. 13–14; 59 Cong. Rec. 244, 7729, 7733; 58 Cong. Rec. 2020, 2026; 57 Cong. Rec. 4637, 4638; 56 Cong. Rec. 8916, 8929, 9038–9039, 9110, 9660, 10474, 10485, 10634, 10636–10638, 10640–10645.[*] Com-

[*] The jurisdictional conflict between those committees supervising public lands and forest reserves, on the one hand, and interstate and foreign commerce, on the other, had delayed the 1920 legislation. See H. Rept. 61, 66th Cong., 1st sess., pp.

merce with the Indians was never contemplated as a constitutional head of jurisdiction for the Power Act.

C. *Compensation for Federal Lands and Indian "Reservations".* Moreover, the Power Act's plan of compensation for lands used in licensed projects is explicable only if the term "reservation" in the Act is limited to real property interests of the United States. The Power Act provides two methods of payment. Under Section 21, 16 U.S.C. 814, licensees are authorized to acquire by condemnation, in federal or state court proceedings, all lands and properties necessary for the licensed development. However, this exercise of eminent domain does not apply to lands or properties owned by the United States. For Section 10(e), 16 U.S.C. 803(e), states that, among other items, "the licensee shall pay to the United States reasonable an-

---

3–4; S. Rept. 180, 66th Cong., 1st sess., p. 5; H. Rept. 715, 65th Cong., 2d sess., pp. 13–15; See 56 Cong. Rec. 10636–10638, 10640–10645. The two sources of federal authority were also pointed out in the Senate's request to a subcommittee of its Judiciary Committee, for a report on the authority of the Federal Government over the development of water power, and, specifically, whether it could impose certain conditions on use of nonnavigable streams, navigable streams and "in disposing of any of its lands, reserved or unreserved". Among other conclusions the subcommittee affirmed the Government's full power as owner of its lands. S. Doc. 246, 64th Cong., 1st sess., pp. 7, 19–20.

As passed in 1920, the commerce part of the Commission's jurisdiction was limited to licensing "across, along, from or in any of the navigable waters of the United States" (Section 4(d), 41 Stat. 1063). In 1935, this was amended to its present form, quoted *supra*, p. 64, extending to the full interstate and foreign commerce power over streams, without limitation to navigability (the Section was then renumbered 4(e), 49 Stat. 838).

nual charges * * * for recompensing it for the use, occupancy and enjoyment of its lands or other property" (*infra*, pp. 81–82).

The provision in Section 10(e) for annual payments to the United States for "*its* lands or other property" was, furthermore, clearly intended by Congress to cover all Indian lands which fall within the Act's definition of "reservation". For, at all times, the first proviso to Section 10(e) has set forth a special condition governing the annual charges to be paid to the United States for "tribal lands embraced within Indian reservations."[50] The quoted phrase is taken

[50] At present, the Section 10(e) proviso distinguishes "tribal lands embraced within Indian reservations" from other Government lands by fixing minimum intervals for the readjustment of charges for Indian lands and, in addition, making the amount of the annual charge subject to the approval of the Indian tribe concerned if the tribe has organized under the Wheeler-Howard Act of 1934 (the Tuscarora Nation has not so organized). The proviso also establishes parallel conditions on charges for the use of Government dams and other federal structures.

The original proposal for specification of items to be paid the United States came from the Senate Committee on Commerce in 1919, which sought to limit administrative discretion and, at the same time, assure that "the Government will be fully reimbursed * * * for the use of its property" (among other things). The Senate amendment prescribed charges "for the use and occupation of any public lands and lands in reservations * * * based upon the actual value of the Government lands used", with an exception for "tribal lands embraced within Indian reservations" (and Government dams and structures) which had the effect of permitting any reasonable charge for use of them, while charges for other "public lands and lands in reservations" were subject to a maximum. S. Rept. 180, 66th Cong., 1st sess., pp. 1–2, 14. As enacted, the description of Government lands or property was put in its present form and the only difference for Indian lands and Government dams was a

from the definition of "reservation" in Section 3(2), *supra*, p. 59. Since this Section 10(e) proviso follows upon and modifies the requirement at the beginning of Section 10(e) for an arrangement with respect to *Government* lands and property, it follows that, to qualify as such "reservation", the Indian lands referred to by Congress must be or include Government property.

This distinction between the two methods of compensation in the Power Act—for federal property and for non-federal property—rests on the fact that, with respect to lands already owned by the United States, no condemnation is necessary to obtain fee title and to make them available for hydroelectric development. But that policy would not extend to the Tuscarora lands in suit, nor to other Indian lands in which the Government has no property interest. The appropriate method under the Power Act for forcibly acquiring such lands, or interests in them, is by a condenmnation proceeding, and full eminent domain compensation would have to be paid.[51] Indeed, the pay-

minimum interval for readjustment, the first condition in the present proviso, 41 Stat. 1069; H. Rept. 910, 66th Cong., 2d sess., pp. 3–4, 9; S. Doc. 269, 66th Cong., 2d sess., pp. 3–4. The second condition was added in 1935 (49 Stat. 843), when the Water Power Act was generally amended and became Part I of the Federal Power Act.

[51] This plan of compensation for lands is specific to the Federal Power Act. Congress, of course, has the same constitutional power to administer all Indian reservations regardless of the state of the title. Our point is only that in the Power Act it made a distinction between the treatment of Indian reservations, depending upon the title interest of the United States.

When condemnation is required under the Federal Power Act, as in this case, the interest taken should be that interest best adapted to both the execution of the project and the protection of the rights of the Indians.

ment of full compensation in this case would enable the Nation to replace entirely the lands used for the Niagara Project and thus would appear more advantageous to it. Just as the Tuscarora lands are subjects of condemnation, not of annual charges, so these lands are not "tribal lands embraced within Indian reservations" requiring special treatment under the proviso to Section 4(e).

D. *The Power Act's Use of "Reservation" and General Indian Law.* Against this compelling evidence of the meaning of the Federal Power Act, it will not do to insist that, ordinarily, no distinction is made between Indian "reservations", and that the term has only one possible meaning.

Equal treatment and consistent characterization have not been the undeviating rule. Respondent and the Court of Appeals have adduced only the statutory restraint upon alienation, which applies to all types. R. 429–431; Brief in Opposition, pp. 24–25. But, on the other hand, the term "reservation" is sometimes used to include allotted lands, sometimes not. See *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 214–217. In an appropriate case, the words "public lands" are construed to include Indian reservations on such lands. *Nadeau* v. *Union Pacific R.R. Co.*, 253 U.S. 442, 444. Respondent has also ignored the General Allotment Act of 1887, which set the pattern for Indian relations until 1934, and which authorized allotment in severalty—not of all Indian reservations—but only of those created by treaty, Act of Congress, or Executive Order. Section 1, 24 Stat.

388, as amended, 25 U.S.C. 331. The Act did not extend to reservations created by purchase, like the respondent Nation's (R. 354; Exhibit 250, R. Ex. 234–238; Tr. 5219–5220, 5376. The Tuscaroras have indeed allocated their lands into individual holdings (as its members testified—R. 55–56, 69, 198–199, 204; Exhibit 235, R. Ex. 208) but this was accomplished under specific authority of New York law, N.Y. Indian Law (25 McKinney's Consol. Laws), Sec. 95.[52] Finally, in the federal allotment process, Congress has on occasion used retention of title in the United States as a criterion for the continuation of regulatory restrictions. *E.g., United States* v. *Nice*, 241 U.S. 591, 595, 599–60.

The Federal Power Act, at the outset, gives notice that it employs a special meaning of "reservation" with respect to Indian lands. It includes only "tribal lands", not allotted lands, within its definition; and a further distinction was made, separating Indian reservations in which the United States owns trust title (or other real property interest) from other reservations. This special rule for the Power

[52] If the Tuscaroras had allotted their lands under the federal statute, the lands of the individual members would be excluded from the Power Act definition of reservation (not being "tribal lands") and would also be generally subject to condemnation, like any private lands, under the express terms of 25 U.S.C. 357. Nearly all the land sought for the reservoir consists of individual holdings allocated under state law, with certain rights of testamentary and inter vivos disposition enforceable in the New York courts. The Tuscaroras have urged, nevertheless, that all the members' lands continue to be "tribal lands" for federal purposes, and that they may enjoy the advantage of both statutes at the same time. *E.g.*, Tr. 5376–5378.

Act is demonstrated, as we have shown, by the Act's definition of "reservation", by the jurisdictional bases for licensing projects, by the Act's compensation provisions, and by its history. In the light of the development of the Power Act, there was ample reason for Congress to formulate such a special meaning of "reservation" in that Act—which controls here, and requires reversal of the decision below.

III

EVEN IF THE DECISION BELOW WAS CORRECT WITH RESPECT TO THE TUSCARORA LANDS, THE JUDGMENT WAS IMPROPER SINCE IT DIRECTED THE AMENDMENT OF A LICENSE BY THE FEDERAL POWER COMMISSION.

As we have shown, the Court of Appeals erroneously invalidated the license issued to the Power Authority to the extent that the license authorized the condemnation of the lands of the Tuscarora Indians. This error was compounded when the court remanded the case to the Commission with instructions to amend its order "so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes" (R. 533).

As this Court held in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21, the power of the Court of Appeals "to affirm, modify, or set aside" a Commission order "in whole or in part" does not authorize it to exercise "an essentially administrative function". Its function ends when an error of law is

laid bare; the matter must then be returned to the agency for reconsideration.

The order below in effect compels the implementation of a modified license. But under established law it was not up to the Court of Appeals to determine whether, and to what extent, the Project should proceed if Indian lands may not be taken. Ordinarily, the Commission (under Section 10(a) of the Power Act, *infra*, p. 81) would have to decide whether a project with a smaller reservoir is still "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *". This is "an administrative, not a judicial, decision." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. at 21. In this case, the problem is accentuated by the fact that Congress itself had made the initial decision to launch a Niagara Project of the fullest scope, which the decision below will prevent. We submit that the Court of Appeals should have gone no further than to remand the case to the Commission for its further consideration in the light of the court's decisions and the Congressional enactment.

CONCLUSION

For these reasons, the judgment below should be reversed for the grounds set forth in either Point I or Point II, and this Court should sustain the Commission's issuance of a license for the full development of Niagara power including the taking of Tuscarora lands

necessary for the purpose. If the decision below on the Tuscarora lands was correct, the judgment below should be modified as prayed in Point III.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
LIONEL KESTENBAUM,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
JOHN C. MASON,
Deputy General Counsel,
LEONARD D. EESLEY,
Assistant General Counsel,
JOSEPH B. HOBBS,
Attorney,
Federal Power Commission.

OCTOBER 1959.

APPENDIX

STATUTES INVOLVED

1. Public Law 85–159, approved August 21, 1957, 71 Stat. 401, provides:

> AN ACT To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.
>
> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:
>
> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any

case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance

the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

* * * * *

2. The pertinent provisions of the Federal Power Act, 49 Stat. 838, as amended, 16 U.S.C. 791a, *et seq.*, are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies or water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations

and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoy-

ment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: * * *

* * * * *

U. S. GOVERNMENT PRINTING OFFICE 1939